

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of the
Villa Health Care Center

**RECOMMENDATION ON
CROSS MOTIONS FOR
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Richard C. Luis ("ALJ") on Cross Motions for Summary Disposition filed by counsel for Villa Health Care Center and the Minnesota Department of Human Services on November 30, 2005. The parties filed Reply Briefs on December 14, 2005. Oral argument was heard on February 8, 2006, and the record with respect to the Cross Motions closed on that date.

Thomas L. Skorczeski, Orbovich & Gartner, Chtd., 417 Historic Hamm Building, 408 St. Peter Street, St. Paul, MN 55102-1187, represented Villa Health Care Center ("Villa"). Erika S. Sullivan and Barry R. Greller, Assistant Attorneys General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2127, represented the Minnesota Department of Human Services ("Department," "DHS"). Mr. Greller was accompanied at the oral argument by Diane Krueger, Administrative Law Manager, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommendation for Summary Disposition that follows. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

Based on all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that:

1. The Department's Motion for Summary Disposition be **GRANTED**.
2. The Commissioner **AFFIRM** the Department's rate adjustment to Villa Health Care Center's property-related repayment rate under appeal in this proceeding.

Dated this 10th day of March 2006.

/s/ Richard C. Luis

RICHARD C. LUIS

Administrative Law Judge

MEMORANDUM

Summary disposition is the administrative equivalent of summary judgment.¹ Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.³ The parties agree there are no issues of material fact to be contested in this matter, and filed a Stipulation of Facts with the ALJ on October 31, 2005. Accordingly, this Recommendation is based on an analysis of the applicable law. With respect to each Cross Motion under review, the nonmoving party has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.⁴

¹ Minn. R. 1400.5500 (K).

² *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

³ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁴ See *Celotex*, 477 U.S. at 325; *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hospital*, 362 N.W.2d 386, 389 (Minn. App. 1985).

Factual Background

Appellant Villa Health Care Center is an 80 bed skilled nursing facility located at 110 North Seventh Street in Mora, Minnesota. The facility is owned by Long Term Health Care Associates, Inc., a subchapter “S” corporation. The corporation is owned equally by Betty and Dale Thompson.

Villa participates in the Minnesota Medical Assistance (“MA”) program and receives reimbursement for services provided to MA recipients through payment rates established under Minnesota Statutes Chapter 256B. Since December 1997, Villa has participated in the contractual Alternative Payment System (“APS”) pursuant to Minn. Stat. § 256B.434. Villa’s first APS daily payment rates were issued by DHS and were based upon Rule 50 payment rates that were effective on July 1, 1997.

At all times relevant to the issues in this appeal, Villa’s payments for services provided to MA recipients were “determined and governed” by Minnesota Statute and the terms of its annual contracts with the Department. Under its APS contracts, Villa was paid a per diem rate for each resident day of service provided.⁵

APS per diem rates are composed of a property-related payment component and an operating payment component which varies, depending upon where a particular resident falls on a statutorily defined measure of the level of care required. At issue in this appeal is Villa’s property-related payment rate effective December 1, 1999, and for all periods subsequent to that date.

The audit that resulted in the reduced rates under appeal in this case did not relate to Villa’s APS base year cost report of September 30, 1996.

In November 1997, Villa received approval under Minn. Stat. § 144A.073 for an exception to Minnesota’s nursing home construction moratorium, authorizing it to complete a construction project. In the Narrative Summary of its moratorium exception proposal, Villa explained that it currently had only one private room. In the paragraph entitled “Description of Villa Health Care Center’s Proposed Project and How These Changes Address the Identified Problems,” Villa explained that the proposed project “would eliminate all of Villa’s three bed wards, adding seven private rooms and one double room.”⁶

Villa completed the moratorium construction project in November 1999 and sought an increase in its property-related rate to reflect the increase in costs associated with the project, pursuant to Minn. Stat. § 256B.434, subd. 10(b). In support of its request for the rate increase, Villa submitted a report of cost information related to the project to the Department in January and April 2000. The Department requested and received additional information from Villa related to its request for a rate increase.⁷

⁵ Stipulation Ex. A.

⁶ Stipulation Ex. B. (Villa’s Moratorium Exception Application, § III).

⁷ Stipulation Exs. C, D.

Shortly thereafter, the Department issued a new property-related rate for Villa, retroactive to December 1999. The new property rate added costs of \$797,664 to the appraised value of the facility and incorporated additional average debt of \$792,432 and interest expenses of \$80,993 related to the project. Villa's property-related rate was increased to \$10.915 per resident day to reflect these costs.⁸

To calculate a provider's property-related per diem payment rate, allowable costs are divided by 95% of the nursing home's capacity days. In general, capacity days are calculated by multiplying the number of beds times 365. Under an election selected by Villa, the number of capacity days was further increased by one half of the number of single bed rooms (private rooms) multiplied by 365.

In 2003, Villa sought an additional upward adjustment to its property-related rate pursuant to Minn. Stat. § 256B.431, subd. 30 (b), to reflect its decision to place three of its beds in layaway status. In the course of calculating Villa's layaway adjustment, the Department discovered that it had made an error when it calculated Villa's 1999 construction property rate adjustment. The Department's 1999 calculation had understated Villa's capacity days because Department staff based its calculation on only one single bed room rather than the eight single bed rooms existing after Villa's project was completed. This error resulted in a lower divisor and a higher rate. When this error was discovered in 2003, the Department calculated Villa's capacity days based on eight single bed rooms. That change increased this divisor from 27,989.85 to 29,127. Using this corrected divisor, the property-related daily payment rate was revised to \$10.551 (v. \$10.915) effective December 1, 1999. Villa does not dispute the mathematical correctness of this revision.

The Department notified Villa of the error in the capacity days calculation by memo dated October 23, 2003.⁹

By correspondence dated October 28, 2003, the Department notified Villa that it would be conducting a field review of the facility.¹⁰ The Department sent a follow-up letter dated November 4, 2003, regarding the on-site review.¹¹ As part of the review, Department staff toured the Villa facility and confirmed that Villa has not one, but eight single bed rooms.

On April 9, 2004, the Department issued its Final Report of Compliance Audit for Villa.¹²

Villa appealed the adjustment by letter dated June 8, 2004.¹³

⁸ Stipulation Ex. E. (Rate Notice Accompanying Villa's new property rate.)

⁹ Stipulation Ex. F.

¹⁰ Stipulation Ex. G.

¹¹ Stipulation Ex. H.

¹² Stipulation Ex. I.

¹³ Stipulation Ex. J.

By correspondence dated June 17, 2004, the Department notified Villa that it would not implement the layaway adjustment to Villa's property rate requested pursuant to Minn. Stat. § 256B.431, subd. 30(b) until the present dispute over Villa's construction project rate adjustment is resolved.

On February 28, 2005, the Department issued its Appeal Determination, pursuant to Minn. Stat. § 256B.50, subd. 1c (a).¹⁴ On March 30, 2005, Villa requested a contested case hearing pursuant to Minn. Stat. § 256B.50, subd. 1c (c).¹⁵

By correspondence dated June 20, 2005, the Department notified Villa that, pursuant to Minn. Stat. § 256B.0641, subd. 1, the Department would collect \$15,856 from Villa, representing the federal share of the disputed overpayment.¹⁶ The Department has collected that amount from Villa by deductions from MA payments due to Villa.

This appeal was set on for a contested case proceeding by order dated August 15, 2005. After a Prehearing Conference was held, the parties agreed to resolve this matter on Cross Motions for Summary Disposition.

Villa asserts that the statutory exemption at Minn. Stat. § 256B.434, subd. 10(a)(2) prevents the Department from making an adjustment to the reimbursement provided under the APS program. Villa cites the Recommendation of the Administrative Law Judge in the **Crest View** case¹⁷ as authority to support its claim that the reimbursement amount is exempt from subsequent adjustment.

The Department maintains that Villa's seeking approval of an exception to the capacity moratorium imports the Rule 50 audit process into the APS program. The Department points out that an error in a facility's favor would be equally subject to correction under its approach.

Each party maintains that there are no disputed issues of fact and that the resolution of this matter can be made as a matter of law.

Relevant Statutory Provisions

The statute under which Villa is receiving reimbursement reads in pertinent part as follows:

256.434 Alternative payment demonstration project.

¹⁴ Stipulation Ex. L.

¹⁵ Stipulation Ex. M.

¹⁶ Stipulation Ex. N.

¹⁷ ***In the Matter of the Rate Appeal of Crest View Lutheran Home***, OAH Docket No. 11-1800-15595-2 (ALJ Order issued February 13, 2004).

Subd. 10. **Exemptions.**

- (a) To the extent permitted by federal law,
 - (1) a facility that has entered into a contract under this section is not required to file a cost report, as defined in Minn. R. 9549.0020, subp. 13, for any year after the base year that is the basis for the calculation of the contract payment rate for the first rate year of the alternative payment demonstration project contract; and
 - (2) a facility under contract is **not subject to audits of historical costs or revenues, or paybacks or retroactive adjustments based on these costs or revenues, except audits, paybacks, or adjustments relating to the cost report that is the basis for calculation of the first rate year under the contract.**
- (b) A facility that is under contract with the commissioner under this section is not subject to the moratorium on licensure or certification of new nursing home beds in § 144A.071, unless the project results in a net increase in bed capacity or involves relocation of beds from one site to another. Contract payment rates must not be adjusted to reflect any additional costs that a nursing facility incurs as a result of a construction project undertaken under this paragraph. In addition, as a condition of entering into a contract under this section, a nursing facility must agree that any future medical assistance payments for nursing facility services will not reflect any additional costs attributable to the sale of a nursing facility under this section and to construction undertaken under this paragraph that otherwise would not be authorized under the moratorium in § 144A.073. **Nothing in this section prevents a nursing facility participating in the alternative payment demonstration project under this section from seeking approval of an exception to the moratorium through the process established in § 144A.073, and if approved the facility's rates shall be adjusted to reflect the cost of the project.** Nothing in this section prevents a nursing facility participating in the alternative payment demonstration project from seeking legislative approval of an exception to the moratorium under § 144A.071, and, if enacted, the facility's rates shall be adjusted to reflect the cost of the project.

(Emphasis added.)

With regard to the moratorium exemption reimbursement adjustment process, the statute references Minn. Stat. § 144A.073, which requires the application of Minn. Stat. § 144A.071, which, in turn, requires the application of the process in Minn. R. 9549.0060. The relevant portion of the rules requires calculation of capacity days as follows:

9549.0060 DETERMINATION OF THE PROPERTY RELATED PAYMENT RATE.

Subp. 11. **Capacity days.** The number of capacity days is determined under items A to C.

- A. The number of capacity days is determined by multiplying the number of licensed beds in the nursing facility by the number of days in the nursing facility's reporting period.
- B. Except as in item C, nursing facilities shall increase the number of capacity days by multiplying the number of licensed single bedrooms by 0.5 and by the number of days in the nursing facility's reporting period.

Discussion

In this matter, the Department is not seeking to adjust the base rate established in the initial year of Villa's APS program participation. Rather, the Department is seeking to change the size of a property-related rate adjustment allowed to increase Villa's APS rate. The adjustment allowed by statute is limited to reflecting "the cost of the project."¹⁸ The Department is correcting an error made through an adjustment process subsequent to the setting of Villa's APS rate¹⁹ that overstates the allowable "cost of the project."

The adjustment process used by Villa to obtain reimbursement for its exemption from the moratorium itself lies outside the APS process. The oversight applied by the Department is not subject to the exemption from "audits of historical costs or revenues, or paybacks or retroactive adjustments based on these costs or revenues" found in Minn. Stat. § 256B.434, subd. 10. The oversight comes through the statutory authority granted to the Department to oversee the process under which Villa obtained the increase in its reimbursement rate. This oversight, and the capability for subsequent adjustment, applies with equal force whenever the facility has received insufficient reimbursement or if there has been a mistake that understated the number of licensed single-bed rooms.

The Department maintains that participation in the moratorium exemption process has the effect of the importing the Rule 50 audit process into the calculation for APS reimbursement. This assertion is unsupported by the statutory language governing the reimbursement process. The Rule 50 process uses historical costs and revenues to determine the allowable reimbursement amount. Such an approach would

¹⁸ Minn. Stat. § 256.434, subd. 10(b).

¹⁹ This situation is different than the facts in **Crest View**, where the Department was making historical cost adjustments in prior rate years. All the adjustments in this case are limited to reducing the increase to the property rate adjustment after Villa elected to utilize the APS methodology.

be contrary to the explicit statutory language governing the APS program. As stated in Minn. Stat. § 256B.434, subd. 10(a)(2):

- (2) a facility under contract is not subject to audits of historical costs or revenues, or paybacks or retroactive adjustments based on these costs or revenues, except audits, paybacks, or adjustments relating to the cost report that is the basis for calculation of the first rate year under the contract.

The statutory language makes plain that Rule 50 audit procedures are only applicable to the initial year of the contract, not subsequent years. The ability of the Department to make a subsequent adjustment to an allowed exemption to the APS process is grounded entirely on the Department's authority to apply the statutory standards (including the portion incorporating the capacity calculation rule) to Villa's request to increase the reimbursement rate.

R.C.L.